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IN THE

Supreme Court of the United States

October Term, 1997

OMEGA ENVIRONMENTAL, INC.; ATS OMEGA; KELLEY OMEGA; JOHN J. REYNOLDS; PATRICK J. REYNOLDS; MICHAEL J. REYNOLDS; FEDORICO HALLER; FRANCISCO CALLEJA; FERNANDO CALLEJA; WILLIAM H. KELLEY,
Petitioners,

v.

GILBARCO, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Gilbarco's brief in opposition makes four primary errors and fails to dispute seriously the importance of this case to the development of antitrust law. Gilbarco does not deny that the Ninth Circuit's majority decision trumps jury balancing of all the facts in every Rule of Reason case where (a) a vertical restraint operates on

distributors; (b) a contract is theoretically terminable on short notice; or (c) prices have declined, output has increased, or market shares have fluctuated to some degree.[1] Nor does Gilbarco have a persuasive explanation for why one or more of these now dispositive factors did not carry the day in the Court's ruling in *Standard Stations*.[2]

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[1] The record did not show major "fluctuations" in the relevant years. It showed increasing market shares for Gilbarco. Between 1991 and 1995, Gilbarco's share of the dispenser market steadily increased from 34% to 55%. SER0846-47, SER0486-91; CSER0183-95.

[2] The Court in *Standard Stations*, in dealing with a restraint on distributors, assumed "that the duration of the contracts is not excessive," that prices to distributors might have declined, and that markets shares were fluctuating. 337 U.S. at 309-10. Gilbarco contends that market shares in *Standard Stations* were "very stable." Opp. 13. In fact, the Court said that, "though their position relative to each other has *fluctuated*, the figures show that as a group [Standard Oil and six competitors] have maintained or improved their control of the market." 337 U.S. at 309 n.12 (76% total share)(emphasis added). The only difference here is that the group of manufacturers employing the restraint is even smaller and their total market share has grown to a much higher percentage (97% total share). Pet. 3; SER0846-47; SER0486-91. Gilbarco contends that the Ninth Circuit majority was free to ignore the Court's decision in *Fashion Originators Guild* that price declines are not legally dispositive. Opp. 13 n.31. But Gilbarco's rationale, that the 38-60% market share of the defendant group there gave it "sufficient control and power" to exclude rivals, *id.*, is hardly sufficient in a case where Gilbarco alone has such a market share.

II. GILBARCO'S ERRORS

1. Gilbarco relies on the District Court's decision (Opp. App. 1a-35a) partially granting Gilbarco summary judgment in advance of trial. But a party is not limited at trial to the evidence that it adduced in a necessarily limited opposition to a summary judgment motion. The same judge who granted summary judgment on some claims before trial and on others at the end of trial found that the evidence on the Clayton Act claim supported the jury's verdict.

2. Gilbarco admits that the Ninth Circuit did exactly what the petition contends the Court did--the Court took selected items of Gilbarco's evidence, declared them undisputed, and held that those items made legally irrelevant the jury's balancing of all of the evidence. *See, e.g.*, Opp. 12 & 20 (lowered standard of liability for exclusive dealing imposed on distributors), 21 (no anticompetitive foreclosure where other means of distribution are theoretically available).[3]

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[3] Gilbarco contends that the cost to a manufacturer of establishing its own network for direct distribution would not be a barrier to entry, but Gilbarco's own president testified that it costs over $1 million for a single distributor location (of which over 100 are needed nationally) and that a rational manufacturer would not enter the United States market that way but would buy an existing United States manufacturer and its (locked-in) network of distributors. SER0725-26; Reply ER Tab 18.

Even if Gilbarco's evidence on those factors were undisputed, which it was not,[4] the Rule of Reason is not a list of certain factors that can be applied mechanistically and in isolation; instead the Rule requires an assessment of *all* evidence of competitive impact. Gilbarco does not dispute that the Ninth Circuit did not even discuss most of petitioners' evidence of anticompetitive effect,[5] much less agree that it needed to

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[4] For example, Gilbarco asserts that there was "no ... evidence" of attempted entry. Opp. 13 n.31. Gilbarco's own documents showed that it tracked Koppens' three years of efforts, which peaked at a 1.3% market share. CER0307; *see* ER0931-32 (distributor's testimony about Koppens' efforts to solicit his company and other distributors); SER0723 (Gilbarco's president acknowledging Koppens' attempt to enter the market); *see also* ER0771 & SER0883 (1992 Tatsuno efforts to enlist distributor in Kentucky).

[5] Much of that evidence is summarized in the Petition at 3-9. Gilbarco addresses only a few items. For example, Gilbarco says it is irrelevant that it subjectively believed that Omega's approach, unless stopped, would threaten oligopolistic pricing. Opp. 16. The Court, however, admonished in *Broadcast Music, Inc. v. Columbia Broadcasting*, 441 U.S. 1, 33 (1979), that the economic actor normally knows best what the economic effect of its actions will be. And contrary to what Gilbarco asserts, Opp. 16 n.36, Gilbarco was concerned with Omega's effect on Gilbarco's prices. Pet. 7-9; *see, e.g.*, SER0419; SER0345-49; SER0272-74; CSER0110-12. Gilbarco asserts that Omega never contended at trial that prices were too high. Opp. 18. But having studied the market carefully, the plaintiffs' economist testified that prices likely would be lower absent exclusive dealing, ER0777; that exclusive dealing increased the cost of entry, SER0465; and that exclusive dealing had no offsetting procompetitive benefits. SER0458. Gilbarco asserts that the jury instructions failed to focus the jury on injury to competition. Opp. 7. But Gilbarco did not challenge the jury

balance all the evidence. The Ninth Circuit majority certainly did not advertise, and perhaps did not even realize, the rules it has necessarily created. Nonetheless, its approach can mean nothing but that, when the factors favoring the defendant that it did discuss are present, the conduct in question becomes per se lawful. The fact that the Ninth Circuit cited cases like *Tampa Electric* does not mean that it applied them.

The Rule of Reason in a Clayton Act § 3 case requires a balancing of all the evidence and a prediction of the future.[6] Those functions are entrusted to the jury, and here that jury was properly instructed to consider all of the factors now seized upon by Gilbarco and the Ninth Circuit. The Ninth Circuit did not purport to rebalance all of the evidence and predict the future effect of exclusive dealing by an increasingly dominant firm in an increasingly concentrated industry. Indeed, while Gilbarco is correct that the Ninth Circuit had many volumes of excerpts before it, it did not review the entire record, much less observe the demeanor and credibility of the Gilbarco witnesses who made supposedly undisputed statements. Reviewing a trial record is, or

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instructions in the Ninth Circuit, and the instructions, like the statute, required that "the effect of the defendant's alleged exclusive dealing arrangement may be to substantially lessen competition." ER0509, Pet. D2.

[6] Contrary to Gilbarco's suggestion, Opp. 16, *Brooke Group* does not set out what is required of a plaintiff in a Clayton Act § 3 case. *Brooke Group* does not consider an exclusive dealing claim under Clayton § 3; rather it concerns alleged predatory pricing and recoupment, the operation of which necessarily do require certain historical economic conditions. *See* Pet. 23-25 & n.17.

should be, far different from reviewing a summary judgment record, but it is inappropriate in either situation to make selected factors dispositive, thus in fact creating irrebutable presumptions.

3. Gilbarco agrees that exclusive dealing is unlawful if it "would likely cause ... higher prices" (Opp. 15), but then asserts that it is irrelevant that "exclusive dealing has raised the cost to consumers of gathering information about prices." Opp. 17 n.39. (*See also* n.3, *supra.*) This illustrates a key danger of the Ninth Circuit's approach: "Actual market realities" that injure competition are ignored in favor of "formalistic distinctions." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 479 n.29 (1992).

4. Gilbarco applauds the Ninth Circuit's ruling that a dominant manufacturer in a concentrated market is entitled to the lock-in effect of an installed base on its distributors' decisions whether to switch to a new entrant. Opp. 22. According to Gilbarco and the Ninth Circuit, so long as a manufacturer did not engage in predatory tactics to obtain the market share that gives the installed base such a power over distributors, the manufacturer is entitled to use exclusive dealing to maintain that market share and to preserve oligopolistic prices. The manufacturer simply has to insert in its contracts a clause giving the distributor a theoretical right to terminate. This clause will, as a matter of law, trump the de facto cost to the distributors of losing their installed base and any other economic realities that help the manufacturer use exclusive dealing to lock distributors away from potential competitors.

III. CONCLUSION

Although Gilbarco might be willing to argue that the Ninth Circuit's opinion has no impact beyond the facts of this case, the Court can be certain that no other defendant will. The time is ripe for the Court to address this important issue of federal law, and to give guidance to the lower courts and practitioners that rules of per se legality run afoul of the Rule of Reason and the purposes of the antitrust laws.

The writ should issue. Alternatively, the Court should request a response from the United States.

Respectfully submitted,

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